

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD RICE,

Defendant-Appellant.

UNPUBLISHED
September 7, 2010

No. 291711
Oakland Circuit Court
LC No. 2008-219968-FC

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant was found guilty by a jury on February 12, 2009, of delivery of a schedule 2 controlled substance, fentanyl, which caused the death of a person. MCL 750.317a. Defendant was sentenced to 7 to 25 years. He now appeals, and we affirm.

Lisa Meyer, the 18-year-old victim, lived with her parents, Andrew and Charlene Meyer, in West Bloomfield, Michigan. On October 11, 2006, the victim and her friend Jeffrey Poole bought what they believed to be heroin from defendant. It actually turned out to be fentanyl. The victim overdosed on the drug and died. The victim's death was caused by a high quantity of a drug called fentanyl.

Defendant first argues that there was insufficient evidence to support his conviction and sentence. We disagree. A claim regarding the sufficiency of the evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). However, this Court should not interfere with the fact finder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Defendant first claims that he did not make an actual, attempted, or constructive delivery of fentanyl to the victim. He claims that the fentanyl the victim bought was not under his direct control and that he did not direct Poole to give the fentanyl to her. We find no merit to this claim. Defendant was charged and convicted under MCL 750.317a:

A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the public health code . . . that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

MCL 750.317a is a general intent crime, and it does not require the intent that a death occurs from delivery. *People v Plunkett*, 485 Mich 50, 60; 780 NW2d 280 (2010). “Rather, the general intent required to violate MCL 750.317a is identical to the general intent required to violate MCL 333.7401(2)(a): the *delivery* of a schedule 1 or 2 controlled substance.” *Id.* (emphasis in original). As a general intent crime, a delivery offense only requires the intent to do the physical act. *People v Maleski*, 220 Mich App 518, 522; 560 NW2d 71 (1996). “Deliver” or “delivery” is statutorily defined as “the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship.” MCL 333.7105(1). The defendant must simply know that he is delivering a controlled substance. See *People v Mass*, 464 Mich 615, 638; 628 NW2d 540 (2001). The Legislature has classified fentanyl as a schedule 2 substance. See MCL 333.7214(b). Also, heroin is a schedule 1 substance. See MCL 333.7212(b). This is an unambiguous statute, so it is applied as it is written. *People v Mahler*, 156 Mich App 799, 800-801; 402 NW2d 93 (1986).

In this case, defendant knew that he was delivering a controlled substance to Poole. Poole was asked where he was going to get the heroin, and he said, “I was planning on getting it from Ronald Rice.” Poole had known defendant for a couple of years and had bought drugs from defendant in the past. The victim gave Poole \$300 to buy 2 or 3 grams of heroin from defendant. Poole gave the money to defendant, and he “gave me a vile of what I thought was heroin.” The victim then took the drug and died, caused by a high quantity of fentanyl. Later, Poole agreed to wear a wire for the police. Poole met with defendant while wearing the wire. When Poole asked defendant about the victim’s death, he stated, “You and I are the only ones that know what happened.” Defendant told Poole to “take all the numbers off the phone,” which Poole testified was a reference to the numbers Poole used to find defendant. In addition, Poole’s phone had evidence of nine calls made in September to the number identified as defendant’s number. Thus, the jury could have reasonably concluded that defendant actually delivered fentanyl to Poole, that the victim then consumed the fentanyl, and that consumption then that caused the victim’s death. See MCL 750.317a. Contrary to defendant’s argument, there is no requirement that the prosecution prove that he actually delivered the drug to the victim or that he directed that the drug be delivered to the victim.

Next, defendant claims that there was insufficient evidence to prove beyond a reasonable doubt that he delivered the fentanyl that caused the victim’s death. We disagree. MCL 750.317a only requires that a person deliver a schedule 1 or 2 controlled substance to a person, that the substance is consumed by a person, and that the consumption causes the death of that person. As mentioned above, defendant delivered a schedule 2 controlled substance, fentanyl, to Poole, who then delivered it to the victim. The victim consumed the drug. The victim’s death was caused by a high quantity of a drug, fentanyl, found in her blood. The jury could have reasonably concluded that defendant delivered the drug that caused the death of the victim.

Defendant next argues that the trial court improperly scored 15 points on offense variable (OV) 5 because the jury did not find that serious psychological injury requiring professional

treatment occurred to the victim's family. We disagree. Appellate review of a sentence imposed under the guidelines is limited to determining if the sentence was imposed within the appropriate guidelines range and, if not, if the departure from the range was based upon a substantial and compelling reason. *People v Babcock*, 469 Mich 247, 272-273; 666 NW2d 231 (2003). The court has discretion in determining the number of points to be scored if there is evidence on the record that adequately supports a particular score. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). This Court reviews the scoring to determine if the court properly exercised its discretion and if the evidence adequately supported a particular score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

Fifteen points may be scored for OV 5 if "serious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). Contrary to defendant's argument, there is evidence in the record to support scoring 15 points on OV 5. Mr. Meyer stated that the victim was living at home when she died. Mrs. Meyer stated that she had a good, ongoing relationship with the victim. Mrs. Meyer was the first to find the victim dead in her room. During the jury trial, the court stated that Mr. Meyer's grief was obvious. In addition, the PSI report states, "The victim's family is not currently requesting restitution but state that they remain in counseling services to deal with their grief." The Victim's Impact Statement further adds:

Mrs. Meyer stated that both her and her husband are receiving counseling and continue to feel depressed about the death of their daughter, stating that "there are no words that can describe it."

At sentencing, Mrs. Meyer stated, "We will live a lifetime of grief, misery from the loss of her." Mr. Meyer stated that he lost his daughter two and a half years ago and that he missed her very much. Based on these facts, the jury could have reasonably found that the victim's family suffered serious psychological injury requiring professional treatment. Therefore, defendant was properly scored 15 points for OV 5. We affirm defendant's sentence and conviction on this issue.

Defendant next argues that the trial court failed to consider mitigating evidence in his sentence. We disagree. A sentence that is based on inaccurate information is invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997) A defendant is entitled to be sentenced based on accurate information. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006).

Defendant claims that the court failed to properly consider all mitigating evidence in sentencing him. However, defendant fails to describe what mitigating evidence the court failed to consider. An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). Regardless, there is no indication in the record that the trial court based its sentence on inaccurate information. It is clear that the trial court considered all evidence when sentencing defendant.

Moreover, defendant had an opportunity to address the court at sentencing. The court stated that it had reviewed defendant's PSI report. Defendant never challenged the accuracy of the PSI report. The PSI report showed that defendant used cocaine occasionally from 1987 to 2006, and used marijuana occasionally from 1979 to 1985. Defendant denied having a substance

abuse problem. Defendant also denied selling drugs. On February 19, 2008, defendant was evaluated and found “competent to stand trial.” Defendant did not show signs of schizophrenia, but did present mild mood disorder and depression.

The PSI report recommended that defendant be sentenced to a “lengthy term of incarceration at the high end of the Guidelines.” If a sentence is within the appropriate guideline sentence range, this Court may not remand for resentencing, unless there is an error in the scoring guidelines or the trial court relied on inaccurate information in determining defendant’s sentence. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). There is no indication in the record, nor from defendant’s brief, that the trial court based defendant’s sentence on inaccurate information or that the court failed to show mitigating evidence. Therefore, this Court lacks the authority to order resentencing of defendant because he was sentenced according to accurately scored guidelines and in reliance on accurate information.

Defendant next argues that his constitutional rights were violated when he was sentenced to 7 to 25 years. We disagree. Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *Kimble*, 470 Mich at 310-311.

A party may not raise on appeal an issue challenging the scoring of the guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *Kimble*, 470 Mich at 310; see also MCR 6.429(C). Thus, a sentence within the appropriate guidelines range is subject to review only if preserved at sentencing, in a motion for resentencing, or in a motion to remand.

Defendant was charged and convicted under MCL 750.317a:

A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the public health code . . . that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

Defendant’s first claim is that MCL 750.317a permits, but does not require, the court to sentence him to the maximum. Defendant claims the court never stated how it arrived at a 25-year maximum nor did it indicate how the sentence was appropriate to the offense. However, during sentencing, the court acknowledged that it had reviewed the PSI report. The PSI report indicated that defendant should be sentenced for a period of 5 to 25 years. The PSI report also recommended that defendant serve a lengthy term of incarceration at the high end of the guidelines. The court also acknowledged that defendant showed a lack of remorse and that he did not take responsibility for his actions. At sentencing, defendant continually denied any involvement in dealing drugs, and he shifted blame to Poole. Based on this information, the court properly exercised its discretion in sentencing defendant to 7 to 25 years. It is clear from the record that defendant was properly sentenced within the guidelines.

Next, defendant claims that there should have been a downward departure from his sentence because of his substance abuse problem. We disagree. Defendant denied having a substance abuse problem. He only admitted to using marijuana and cocaine in the past. When defendant was questioned about his definition of a substance abuser, he stated, “Someone who takes advantage and sits around and uses everyday.” Defendant stated that this does not define him. Therefore, there was no basis for a downward departure.

Defendant also claims that his rehabilitative potential should have been assessed through intensive alcohol, drug, and psychiatric treatment. We disagree. Defendant was found competent to stand trial. The record shows that defendant was properly evaluated, and he did not object to this evaluation.

Defendant last claims that his sentence of 7 to 25 years’ imprisonment must be vacated because it constitutes cruel and unusual punishment, violates *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and is based on inaccurate information. We disagree. As mentioned above, the PSI report recommended that defendant be sentenced to a “lengthy term of incarceration at the high end of the Guidelines.” The court used its discretion in sentencing defendant based on its review of the PSI report, recommendations, and the statute that he was convicted under. The trial court did not abuse its discretion in sentencing defendant.

Further, defendant’s minimum sentence fell within the recommended minimum sentence range under the guidelines. This Court must affirm defendant’s sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10). As analyzed in Issue III, and throughout this issue, there is no indication that the trial court relied on inaccurate information in sentencing defendant. The probation officer included in defendant’s PSI report a description of defendant’s medical history, substance abuse history, and current psychiatric report. Defendant’s past drug history was documented in the report. A PSI report is presumed to be accurate, and the trial court may rely on the report unless challenged by defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Here, defendant did not make a challenge to the accuracy of the PSI report. Therefore, defendant has failed to show that the trial court relied on inaccurate information or improperly sentenced him. Defendant’s constitutional rights were not violated when he was sentenced to 7 to 25 years.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck